No. 141

Supreme Court, U.S.
FILED
NOV 27 192
WM. R. STANSB
C

IN THE

Supreme Court of the United States

October Term, 1926.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY,

Petitioner,

vs.

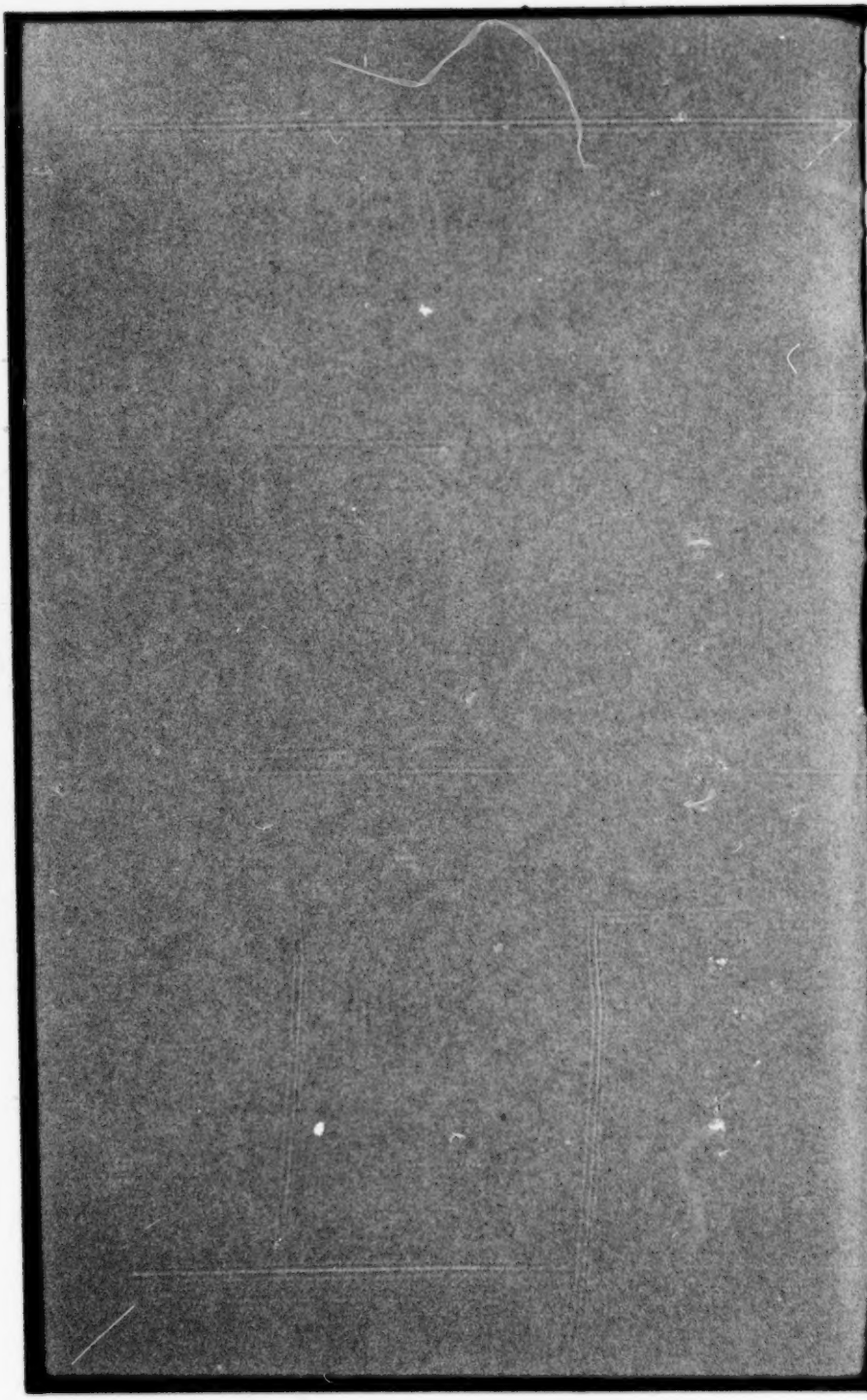
JOHN BRELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

[redacted] KALISCH,
Counsel for Respondent.

Arthur W. Cross, Law Printer, 30-32 Lafayette Street, Newark, N. J.



Subject Index.

	Page
Table of cases	1
Statement of the Case	3
Argument	8
Circuit Court of Appeals had no authority in this case to issue a writ of mandamus	8

Table of Cases.

	Page
Amer. Const. Co. v. Jacksonville Co., 148 U. S. 379	10
Corpus Juris, Vol. 25, p. 860	10
Ex parte Hoard, 105 U. S. 578	9
Ex parte Loring, 94 U. S., p. 165	8
Ex parte Railway Co., 103 U. S. 794	9
McClellan v. Carlin, 217 U. S. 268	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Petitioner*, vs. JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, *Respondents*.	*On Petition for Writ of Certiorari.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARRY KALISCH,
Counsel for Respondent.

STATEMENT OF THE CASE.

On December 9, 1920, one David Ginsberg individually and as next friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg deceased, brought an action at law in the Supreme Court of the State of New Jersey for personal injuries and damages which the said David Ginsberg and Harry Ginsberg were alleged to have suffered, and for the pecuniary loss suffered on account of the death of George Ginsberg for the alleged negligent acts of the agents and servants of the D. L. & W. Railroad Company in running into and

upon said parties a locomotive operated by the agents of the railroad company while said parties were endeavoring to pass over a railroad grade crossing in an automobile.

On account of the diversity of citizenship of the parties, the case was removed from the State court to the United States District Court for the District of New Jersey where issue was subsequently joined and the case duly noticed for trial.

On December 2, 1921, at the September term of the District Court, this cause was tried and resulted in a verdict for all the plaintiffs in said action, which verdict was subsequently set aside by the Trial Court and a new trial granted to the Railroad Company because of the alleged subornation of perjury by the plaintiff, David Ginsberg, of two of his witnesses by the name of Addie and William Ridner.

The only evidence of the alleged subornation of perjury was a confession by the two alleged perjured witnesses. These two witnesses, however, subsequently recanted and in an affidavit which one of them, William Ridner, made on January 12, 1925, he stated that at no time did Mr. Ginsberg ever suggest that he or his wife, Addie Ridner, testify to anything but the truth, and further that at no time did Mr. Ginsberg ever offer anything to him or his wife. This affidavit is Exhibit D, page 17, of the petitioner's petition and will be found on page 21 of petitioner's petition.

On the 1st and 2nd of March, 1923, said cause was again tried before a jury in the United States District Court, District of New Jersey, at Trenton, N. J. At said trial the two witnesses, William Ridner and Addie M. J. Ridner, were sworn and testified in behalf of the Delaware, Lackawanna and Western Railroad Co., instead of for the plaintiffs.

Said William Ridner testified at the second trial that the accident, which is the subject of this suit, occurred late in the evening between six and seven o'clock, and that he, the said William Ridner, had occasion to notice a train come up from Dover toward Chester, and that at that time he was about fifty or sixty feet from the bridge or the tow-path, and that he recollected that the said train blew a whistle and rang a bell, and the said Addie M. J. Ridner testified that on the day of the accident she was in the vicinity of the railroad crossing with her husband and that they had been out for a walk and were on their way home; that they were walking on the tow-path and that she saw a train coming up from Dover toward Chester, and that it was real late in the evening; that she noticed that the train gave bell and whistle signals and that she heard the whistle blow a couple of times, but that the bell rang until it, the train, had passed on over from where they were standing.

The jury in said cause after being unable to agree for some time and remaining out over night returned for further instructions after which they again retired and shortly thereafter brought in a verdict in favor of the defendant, Delaware, Lackawanna & Western R. R. Co.

Exceptions were taken to the additional instructions of the Court and an appeal was taken by the plaintiff, to the United States Circuit Court of Appeals based on those exceptions. No other questions were raised or argued. The appeal was argued at the October Term, 1923, and the mandate of the Circuit Court of Appeals affirming the judgment was entered March, 1924. The opinion is reported in 296 Federal, p. 439.

In the month of March, 1923, plaintiffs' counsel employed one Charles Whitnall, a detective, to make an investigation concerning the two witnesses, William Ridner and Addie Ridner; this was before the appeal to the United States Circuit Court of Appeals had been taken.

The investigation disclosed nothing of importance and on April 15, 1924, plaintiffs' counsel employed David Jacobsen to make a further investigation and said Jacobsen, as a result of said investigation, obtained a statement from one, William C. Smith, and May Bailey. After obtaining said statement said Jacobsen continued his investigation and on January 12 and 13, 1925, succeeded in obtaining from said William Ridner, who was the witness sworn in behalf of the defendant in the last trial, and Ridner's son Seth, affidavits showing that neither William Ridner or his wife Addie Ridner witnessed the accident at all and were at their home when it occurred; these affidavits are Exhibits "C" and "D" in defendant's petition for a mandamus.

The plaintiff, David Ginsberg, is a man in poor circumstances, having been rendered so as a result of this litigation, and has been unable to pay out large sums of money in the constant employment of detectives, but has, however, himself personally made inquiries and investigations concerning the witnesses, William Ridner and Addie M. J. Ridner, which investigation has extended over a long period of time since the rendition of the verdict as above stated.

That upon the presentation of the foregoing facts together with the sworn statements of said William Ridner and Seth Ridner referred to above and upon due notice given to defendant, Judge Rellstab on the 28th day of April, 1925, allowed a rule to show cause why the verdict and judgment entered in said cause should not be set aside and a new trial granted. Upon said application defendant submitted two affidavits touching upon the substantial merits of the application and nothing was then said upon the question of jurisdiction; and in allowing said rule Judge Rellstab directed me to submit a copy of the order to defendant for his approval, which I did and defendant after making some minor changes in the

order, concerning the taking of testimony under the order, returned the same to me and Judge Rellstab signed it after he also had made some trivial alterations.

The order to show cause was returnable May 5, 1925, and on that day both parties appeared by their counsel; the witnesses, William Ridner and Addie Ridner, appearing under subpoena; it being the expressed desire of Judge Rellstab to hear both these witnesses in open court. When the matter was opened no objection was made by the defendant to the jurisdiction of the court nor does the transcript or record show such objection until the very end of the proceedings when Judge Rellstab announced his determination to make the rule absolute; the entire matter was heard on its merits; the star witness being William Ridner; the defendant examining witnesses as well as the plaintiff, as will appear from the transcript.

At the close of this witness' testimony the Court called both counsel and announced his determination to make the rule absolute, whereupon defendant's counsel *then* raised the question of lack of jurisdiction, and the Court formally disposed of the matter as follows:

> The Court: As the matter stands before me, this application for setting aside of the verdict is founded upon conditions that were not brought to the attention of the plaintiff, until, after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late.
>
> However, if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire.
>
> It seems to me that without going into further testimony, there is enough disclosed by Ridner's testimony, to require the Court to make the rule absolute.

The claim of the petitioner is that the judgment and verdict were set aside more than four terms after the judgment was entered without having had the term at

which the judgment was entered, extended, and that the judgment for the defendant, Delaware Lackawanna & Western Railroad, having been appealed to the Circuit Court of Appeals and affirmed by that Court and its mandate sent down, the United States District Court could not interfere with the judgment but was required to carry out the mandate of the Circuit Court of Appeals.

ARGUMENT ON BEHALF OF RESPONDENTS.

Circuit Court of Appeals had no authority in this case to issue a writ of mandamus.

The rule is firmly established that the writ of mandamus cannot be used as a writ of error. This has been repeatedly held. The case of *Ex parte Loring*, 94 U. S. Supreme Court, (4 Otto), page 165, presents the identical question raised in the case at bar. The opinion is by Waite, *C. J.*, and the facts briefly were as follows:

The plaintiff in the action after his case was in, took a non-suit, and a judgment to that effect was entered at June term, 1874. In October, 1876, at subsequent term of court plaintiff on notice to defendant moved to vacate judgment of non-suit and restore the cause to the docket for trial. This motion was granted October 31st, and later in the term defendant moved to vacate the order of October 31st, which motion was denied; the petition by defendant, for mandamus is to require the Court below to vacate the order setting aside said non-suit. Waite, *C. J.*, said in his opinion in that case:

> "It seems clear to us that the object in this case is to use the writ of mandamus as a writ of error. This cannot be done. We may require the Circuit Court in a proper case, if it refuses, to act but cannot control its decisions. Here the court has acted and given its decision upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a

> writ of error after a final judgment has been rendered. The writ of mandamus has no such office to perform. Petition denied."

Another case in point is *Ex Parte Railway Co.*, 103 U. S. Supreme Court, page 794. In that case the motion was for a rule to show cause why a peremptory mandamus should not issue to the Circuit Court commanding it to set aside its orders dismissing the suit and dissolving the attachment, etc. The ground for dismissing the suit and dissolving the attachment was jurisdictional. I quote from the opinion, page 795,

> "that afterwards said motion for such order coming on for hearing, said Alley entering a special plea to the jurisdiction, the gravamen thereof being that he was not an inhabitant of said district, etc., that the court sustained the plea and adjudged that the suit be dismissed and the attachment dissolved."

Waite, *C. J.*, delivered the opinion of the court saying:

> "This motion is denied, first because it is an attempt to use the writ of mandamus as a writ of error to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit."

The Court did not even allow a rule to show cause. See also *Ex Parte Hoard*, 105 U. S. Supreme Court, page 578, October term, 1881. The opinion in that case cites with approval the Loring case *supra* and on page 580 says:

> "It is an elementary principle that a mandamus cannot be used to perform the office of an *appeal or a writ of error.*"

In *Amer. Const. Co.* v. *Jacksonville Co.*, 148 U. S. Supreme Court, page 379, the Court said the following upon the subject of mandamus:

> "It does not therefore lie to review a final judgment or decree of the Circuit Court sustaining a plea to the jurisdiction even if no appeal or writ of error is given by law. Least of all can a writ

> of mandamus be granted to review a ruling or interlocutory order in the progress of a cause."

See also *Corpus Juris*, Vol. 25, page 860.

Counsel for petitioner takes the position that the Circuit Court of Appeals has *unqualified* authority to issue a writ of mandamus.

He offers in support of his contention one case *McClellan* v. *Carlin*, 217 U. S. Rep., page 268. He quotes just enough of it to give a false impression of what that case decided. That case did not depart in the slightest from the principle approved in the above-mentioned cases that mandamus will issue *only* in aid of the appellate jurisdiction. It did go so far as to say that in aiding the appellate jurisdiction, the Circuit Court of Appeals need not await the arrival of the case there, but can mandamus the Court below to proceed to final judgment where the Court below has refused to do so, so that the aggrieved party may have his appeal from the judgment to the Circuit Court of Appeals if desired; in this way the suitor's right of appeal to the Circuit Court of Appeals is aided and protected by the mandamus, but the writ of mandamus is not the appeal itself and can never be used as such.

A cursory reading of *McClellan* v. *Carlin* (*supra*), the case relied upon by petitioner, will demonstrate the correctness of the foregoing view.

It was a suit commenced against Geo. T. Blackman, administrator of the Estate of John C. McClellan, deceased, and others in the Circuit Court of the United States for the District of South Dakota in which suit complainants were citizens of states other than South Dakota and the defendant, Blackman, was a citizen of South Dakota. The bill set up that complainants were the sole surviving heirs at law and next of kin of John C. McClellan who died intestate; that defendant Blackman, administrator, etc., had

in his possession assets of about $35,000; consisting of real and personal property, that there were no unsatisfied claims and that the estate was ready for distribution according to the laws of South Dakota; the bill prayed that the complainants might be adjudicated the sole heirs at law and next of kin of said decedent and entitled to inherit the estate, and that Blackman render a just and true account of the property in his hands. Defendant, Blackman, answered by admitting certain allegations and denying others and stating that he held the property subject to the order of the Court. At this juncture the State of Dakota by its attorney general asked leave to intervene in the case, claiming that decedent died without legal heirs and that there was an escheat of the estate. The Court refused to permit the State of Dakota to intervene but ordered that a further prosecution of the action then pending before it be stayed for the period of ninety days for the purpose of allowing the State of Dakota to commence a proper action to establish its title and interest in and to the estate of the decedent and until the determination of such action brought by the State of Dakota. Complainants filed an application for the vacation of the orders staying the prosecution of their suit until the determination of the suit by the State of Dakota in the State Court, but the same was denied, and thereafter the petition for mandamus in the Circuit Court of Appeals was filed and the writ denied whereupon the U. S. Supreme Court granted the writ of certiorari to review the action of the Court of Appeals.

The Court in its opinion on page 280 recognized that there were different views as to the right to issue such writs (mandamus) before the appellate court has actually obtained jurisdiction of the case, and on that same page says:

> "There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction *actually acquired*."

and then the opinion goes on to say:

> "But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the Court below."

And the Court on page 281 (bottom of page), and 282 says:

> "It cannot be denied that a Circuit Court of the United States like other Courts had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the State Court by its action in a case involving all the parties might render a judgment which would be *res judicata* and thus prevent further proceedings in the Federal Court."

And at the bottom of page 280 the Court in that case says:

> "Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the State Court, might prevent the adjudication of the questions involved and thereby prevent a review thereof in the Circuit Court of Appeals which had jurisdiction for that purpose we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it."

The purpose then in granting the writ of mandamus in that case was to compel the Federal Court below to proceed with the action so that the Circuit Court could exercise its right of review on appeal. Thus it was in direct line with all the cases; it was a mandamus in aid of the appellate jurisdiction of the Circuit Court of Appeals. That case therefore instead of supporting petitioner's view is in direct opposition to it.

It is respectfully submitted that the writ of certiorari be denied with costs.

Isidor [redacted] KALISCH,
Attorney for Respondent.

JAN 3 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Petitioner,

against

HONORABLE JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,
Respondents.

October Term, 1927.

No. 141.

BRIEF FOR RESPONDENTS.

HARRY KALISCH,
Counsel for Respondents,

Arthur W. Cross, Law Printer, 31-37 Lafayette Street, Newark, N. J.

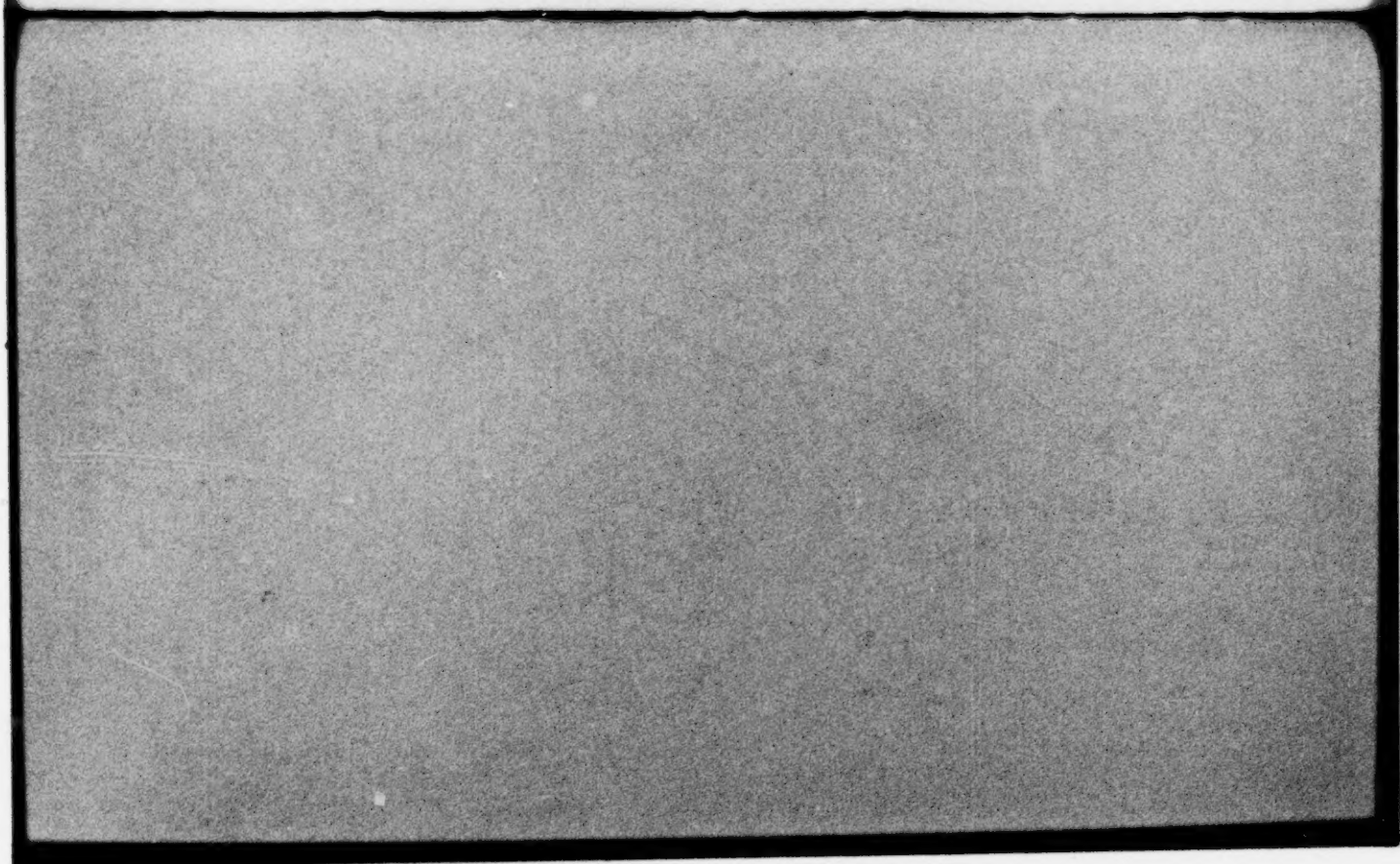


TABLE OF CONTENTS.

	PAGE
Opinion below	1
Statement of the Case	2
POINT I. Circuit Court of Appeals had no authority in this case to issue writ of mandamus	7
POINT II. Mandamus should not issue unless there has been a definite unqualified refusal to act by the inferior court after previous request made to it	17
POINT III. The granting or refusing of a writ of mandamus is discretionary	19

TABLE OF CASES CITED.

	PAGE
American Cons. Co. *v.* Jacksonville Co., 148 U. S. 379	8
Barber Asphalt Paving Company *v.* Morris	14
Bostwick *v.* Brinkerhoff, 106 U. S. 73	16
Brietson Mfg. Co. *v.* Munger	24
Brietson Mfg. Co. *v.* Close	24
Bronson *v.* Schulten, 104 U. S., p. 410	12
Bennett *v.* Kalamazoo, 181 Mich., p. 700; 148 Northwestern Rep. 162	17
Corpus Juris, Vol. 25, p. 860	9
Corpus Juris, Vol. 38, p. 592	18
26 *Cyc.*, p. 155	23
11 *Cyc.*, p. 941	16
Duncan Townsite Co. *v.* Lane, 245 U. S. 308; 38 Sup. Ct. 99	19, 21
Ex Parte Loring, 94 U. S., p. 165	2, 7
Ex Parte Railway Co., 103 U. S., p. 794	8
Ex Parte Hoard, 105 U. S., p. 578	8
Ex Parte Nebraska, 209 U. S. 436-442	12
Edinburg Coal Co. *v.* Humphrey, 134 Fed. Rep. 839	17
Fort Dodge Portland Cement Corporation *v.* Monk, 276 Fed. Rep. 113	15
Freud *v.* Wayne, 131 Mich. Northwestern Rep. 109	17
Gibbons *v.* Ogden, 6 Wheaton 448	16
Hammond Lumber Co. *v.* U. S. Dist. Court for District of Oregon, *et al.*, 240 Fed. Rep., pp. 924-926	12
Hitchcock *v.* Wayne, 97 Mich., p. 614; 56 Northwestern Rep., p. 189	17
Heffner *v.* The Commonwealth, 4 Casey, p. 112	18
In re Pollitz, 206 U. S., p. 323	13
Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675	16
Mayberry *v.* Thompson, 5 Howard 121	16
McClellan *v.* Carlin, 217 U. S., p. 268	9

PAGE

Mesler *v.* Jackson, Northwestern Rep., p. 63..... 17
Muir *v.* Chatfield, 255 Fed. Rep., p. 204..... 12
Nelson *v.* Meehan, 155 Fed. Rep., p. 1..... 12
People, *ex rel.* Wood *v.* Board of Assessors and Collectors of Taxes of Brooklyn, 137 N. Y. 203..... 22
People *v.* Hatch, 33 Ill. 9; p. 134..... 22
People, *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y. 360..... 23
Short on Mandamus, p. 267..... 18
The State, *ex rel. v.* Commissioners of Phillips Co., 26 Kan. 419..... 22
U. S. *v.* Cargill, 258 Fed. Rep. 467..... 21
U. S. *v.* Burleson, 258 Fed. Rep. 282..... 21
U. S. *ex rel.* Arant *v.* Lane, 249 Fed. Rep. 367..... 21
Wetmore *v.* Karrick, 205 U. S., p. 141..... 12

Supreme Court of the United States

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Petitioner,* *against* HONORABLE JOHN RELLSTAB, Judge of the United States District Court for the District of New Jersey, and THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, *Respondents.*	October Term, 1927. No. 141.

BRIEF FOR RESPONDENTS.

This case comes before the Court upon writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, granted December 13, 1926.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 15 Fed. (2d), 137.

The District Court rendered no written opinion but announced verbally its decision in open court as follows:

> The Court: As the matter stands before me, this application for setting aside of the verdict is founded upon conditions that were not brought to the attention of the plaintiff until after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late.
>
> However, if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire.
>
> It seems to me that without going into further testimony, there is enough disclosed by Ridner's testi-

mony, to require the Court to make the rule absolute."

See pp. 38-39 transcript.

The order to be reviewed is dated September 25, 1926 (R., p. 50). It dismissed and discharged a rule to show cause why a writ of mandamus should not issue to the United States District Court for the District of New Jersey and Honorable John Rellstab, Judge of said Court, and thereby refused to interfere with the order of the District Court setting aside the verdict and judgment rendered thereon in the District Court in favor of the petitioner on June 21, 1923, and granting a new trial in said cause.

The grounds on which the jurisdiction of *this* Court is invoked are that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decision of this Court and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. These grounds are without foundation, as this Court has frequently decided that the writ of mandamus should not issue in cases identical with the case *sub jud.* See *Ex parte* Loring, 94 U. S. Supreme Court, p. 165, and other cases cited herein.

Statement of the Case.

On December 9, 1920, one David Ginsberg individually and as next friend of Harry Ginsberg, and as administrator *ad prosequendum* of the estate of George Ginsberg, deceased, brought an action at law in the Supreme Court of the State of New Jersey for personal injuries and damages which the said David Ginsberg and Harry Ginsberg were alleged to have suffered, and for the pecuniary loss suffered on account of the death of George Ginsberg for the alleged negligent acts of the agents and servants of the railroad company in running into and upon said parties a

locomotive operated by the agents of the railroad company while said parties were endeavoring to pass over a railroad grade crossing in an automobile.

On account of the diversity of citizenship of the parties, the case was removed from the State court to the United States District Court for the District of New Jersey where issue was subsequently joined and the case duly noticed for trial.

On December 2, 1921, at the September term of the District Court, this cause was tried and resulted in a verdict for all the plaintiffs in said action, which verdict was subsequently set aside by the Trial Court and a new trial granted to the Railroad Company because of the alleged subornation of perjury by the plaintiff, David Ginsberg, of two of his witnesses by the name of Addie and William Ridner.

The only evidence of the alleged subornation of perjury was a confession by the two alleged perjured witnesses. These two witnesses, however, subsequently recanted and in an affidavit which one of them, William Ridner, made on January 12, 1925, he stated that at no time did Mr. Ginsberg ever suggest that he or his wife, Addie Ridner, testify to anything but the truth, and further that at no time did Mr. Ginsberg ever offer anything to him or his wife. This affidavit is Exhibit D, pages 17-21 of the transcript.

On the 1st and 2nd of March, 1923, said cause was again tried before a jury in the United States District Court, District of New Jersey, at Trenton, N. J. At said trial the two witnesses, William Ridner and Addie M. J. Ridner, were sworn and testified in behalf of the Delaware, Lackawanna and Western Railroad Co., instead of for the plaintiffs.

Said William Ridner testified that the accident, which is the subject of this suit, occurred late in the evening be-

tween six and seven o'clock, and that he, the said William Ridner, had occasion to notice a train come up from Dover toward Chester, and that at that time he was about fifty or sixty feet from the bridge or the tow-path, and that he recollected that the said train blew a whistle and rang a bell, and the said Addie M. J. Ridner testified that on the day of the accident she was in the vicinity of the railroad crossing with her husband and that they had been out for a walk and were on their way home; that they were walking on the tow-path and that she saw a train coming up from Dover toward Chester, and that it was real late in the evening; that she noticed that the train gave bell and whistle signals and that she heard the whistle blow a couple of times, but that the bell rang until it, the train, had passed on over from where they were standing.

The jury in said cause after being unable to agree for some time and remaining out over night, returned a verdict in favor of the defendant, Delaware, Lackawanna & Western Railroad Co. An appeal was then taken by the plaintiff based on certain trial exceptions, to the United States Circuit Court of Appeals, which said appeal was argued at the October Term, 1923, and the mandate of the Circuit Court affirming the judgment was entered in March, 1924.

In the month of March, 1923, plaintiffs' counsel employed one Charles Whitnall, a detective, to make an investigation concerning the two witnesses, William Ridner and Addie Ridner; this was before the appeal to the United States Circuit Court of Appeals had been taken. The investigation disclosed nothing of importance and on April 15, 1924, plaintiffs' counsel employed David Jacobsen to make a further investigation and said Jacobsen, as a result of said investigation, obtained a statement from one, William C. Smith, and May Bailey. After obtaining said statement said Jacobsen continued his investigation and on January 12 and 13, 1925, succeeded in obtaining from

said William Ridner, who was the witness sworn in behalf of the defendant in the last trial, and Ridner's son Seth, affidavits showing that neither William Ridner or his wife Addie Ridner witnessed the accident at all and were at their home when it occurred; these affidavits are Exhibits "C" and "D" in the transcript on pages 14-21.

The plaintiff, David Ginsberg, is a man in poor circumstances, having been rendered so as a result of this litigation, and has been unable to pay out large sums of money in the constant employment of detectives, but has, however, himself personally made inquiries and investigations concerning the witnesses, William Ridner and Addie M. J. Ridner, which investigation has extended over a long period of time since the rendition of the verdict as above stated.

That upon the presentation of the foregoing facts together with the sworn statements of said William Ridner and Seth Ridner referred to above, and upon due notice given to defendant, Judge Rellstab on the 28th day of April, 1925, allowed a rule to show cause why the verdict and judgment entered in said cause should not be set aside and a new trial granted. Upon said application defendant submitted two affidavits touching upon the substantial merits of the application and nothing was then said upon the question of jurisdiction; and in allowing said rule Judge Rellstab directed me to submit a copy of the order to defendant for his approval, which I did and defendant after making some minor changes in the order, concerning the taking of testimony under the order, returned the same to me and Judge Rellstab signed it after he also had made some trivial alterations.

The order to show cause was returnable May 5, 1925, and on that day both parties appeared by their counsel; the witnesses, William Ridner and Addie Ridner, appearing under subpoena; it being the expressed desire of Judge

Rellstab to hear both these witnesses in open court. When the matter was opened no objection was made by the defendant to the jurisdiction of the Court nor does the transcript or record show such objection until the very end of the proceedings when Judge Rellstab announced his determination to make the rule absolute; the entire matter was heard on its merits; the star witness being William Ridner; the defendant examining witnesses as well as the plaintiff, as will appear from the transcript.

At the close of this witness' testimony the Court called both counsel and announced his determination to make the rule absolute, whereupon defendant's counsel *then* raised the question of lack of jurisdiction, and the Court formally disposed of the matter as follows:

> The Court: As the matter stands before me, this application for setting aside of the verdict is founded upon conditions that were not brought to the attention of the plaintiff, until, after the Court of Appeals had decided the issue adversely to him, and as this is really a charge of fraud the application does not come too late.
>
> However, if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire.
>
> It seems to me that without going into further testimony, there is enough disclosed by Ridner's testimony, to require the Court to make the rule absolute.

The claim of the petitioner is that the judgment and verdict were set aside more than four terms after the judgment was entered without having had the term at which the judgment was entered, extended.

On July 13, 1925, the Circuit Court of Appeals for the Third Circuit allowed the petitioner a rule to show cause why a mandamus should not issue to the respondents, the United States District Court for the District of New Jersey and the Honorable John Rellstab, Judge of said Dis-

trict Court, directing the respondents to reinstate the judgment so set aside.

Argument was had on said rule to show cause in the Circuit Court of Appeals for the Third Circuit on December 4, 1925, and on September 25, 1926, the Court filed its opinion (R., p. 45), dismissing and discharging the petitioner Railroad Company's application for a mandamus on the ground that it had no power to issue said writ.

ARGUMENT.

POINT I.

Circuit Court of Appeals had no authority in this case to issue a writ of mandamus.

The rule is firmly established that the writ of mandamus cannot be used as a writ of error. This has been repeatedly held. The case of *Ex Parte Loring*, 94 U. S. Supreme Court, (4 Otto), page 165, presents the identical question raised in the case at bar. The opinion is by Waite, *C. J.*, and the facts briefly were as follows:

The plaintiff in the action after his case was in, took a non-suit, and a judgment to that effect was entered at June term, 1874. In October, 1876, at subsequent term of court plaintiff on notice to defendant moved to vacate judgment of non-suit and restore the cause to the docket for trial. This motion was granted October 31st, and later in the term defendant moved to vacate the order of October 31st, which motion was denied; the petition by defendant, for mandamus is to require the Court below to vacate the order setting aside said non suit. Waite, *C. J.*, said in his opinion in that case:

> "It seems clear to us that the object in this case is to use the writ of mandamus as a writ of error. This cannot be done. We may require the Circuit Court in a proper case, if it refuses, to act but can-

> not control its decisions. Here the court has acted and given its decision upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a writ or error after a final judgment has been rendered. The writ of mandamus has no such office to perform. Petition denied."

Another case in point is *Ex Parte Railway Co.*, 103 U. S. Supreme Court, page 794. In that case the motion was for a rule to show cause why a peremptory mandamus should not issue to the Circuit Court commanding it to set aside its orders dismissing the suit and dissolving the attachment, etc. The ground for dismissing the suit and dissolving the attachment was jurisdictional. I quote from the opinion, page 795,

> "that afterwards said motion for such order coming on for hearing, said Alley entering a special plea to the jurisdiction, the gravamen thereof being that he was not an inhabitant of said district, etc., that the court sustained the plea and adjudged that the suit be dismissed and the attachment dissolved."

Waite, *C. J.*, delivered the opinion of the court, saying:

> "This motion is denied, first because it is an attempt to use the writ of mandamus as a writ of error to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit."

The Court did not even allow a rule to show cause. See also *Ex Parte Hoard*, 105 U. S. Supreme Court, page 578, October term, 1881. The opinion in that case cites with approval the Loring case *supra* and on page 580 says:

> "It is an elementary principle that a mandamus cannot be used to perform the office of an *appeal or a writ of error.*"

In *Amer. Const. Co.* v. *Jacksonville Co.*, 148 U. S. Supreme Court, page 379, the Court said the following upon the subject of mandamus:

> "It does not therefore lie to review a final judgment or decree of the Circuit Court sustaining a

> plea to the jurisdiction even if no appeal or writ or error is given by law. Least of all can a writ of mandamus be granted to review a ruling or interlocutory order in the progress of a cause."

See also *Corpus Juris*, Vol. 25, page 860.

Counsel for petitioner takes the position that this Court has *unqualified* authority to issue a writ of mandamus.

He offers in support of his contention the case of *McClellan* v. *Carlin*, 217 U. S. Rep., page 268. He quotes just enough of it to give a false impression of what that case decided. That case did not depart in the slightest from the principle approved in the above-mentioned cases that mandamus will issue *only* in aid of the appellate jurisdiction. It did go so far as to say that in aiding the appellate jurisdiction, this Court need not await the arrival of the case in that court, but can mandamus the Court below to proceed to final judgment where the Court below has refused to do so, so that the aggrieved party may have his appeal from the judgment to this Court if desired; in this way the suitor's right of appeal to this Court is aided and protected by the mandamus, but the writ of mandamus is not the appeal itself and can never be used as such.

A cursory reading of *McClellan* v. *Carlin (supra)*, the case relied upon by petitioner, will demonstrate the correctness of the foregoing view.

It was a suit commenced against Geo. T. Blackman, administrator of the Estate of John C. McClellan, deceased, and others in the Circuit Court of the United States for the District of South Dakota in which suit complainants were citizens of states other than South Dakota and the defendant, Blackman, was a citizen of South Dakota. The bill set up that complainants were the sole surviving heirs at law and next of kin of John C. McClellan, who died intestate; that defendant Blackman, administrator, etc., had in his possession assets of about $35,000; consisting

of real and personal property, that there were no unsatisfied claims and that the estate was ready for distribution according to the laws of South Dakota; the bill prayed that the complainants might be adjudicated the sole heirs at law and next of kin of said decedent and entitled to inherit the estate, and that Blackman render a just and true account of the property in his hands. Defendant, Blackman, answered by admitting certain allegations and denying others and stating that he held the property subject to the order of the Court. At this juncture the State of Dakota by its attorney general asked leave to intervene in the case, claiming that decedent died without legal heirs and that there was a escheat of the estate. The Court refused to permit the State of Dakota to intervene but ordered that a further prosecution of the action then pending before it be stayed for the period of ninety days for the purpose of allowing the State of Dakota to commence a proper action to establish its title and interest in and to the estate of the decedent and until the determination of such action brought by the State of Dakota. Complainants filed an application for the vacation of the orders staying the prosecution of their suit until the determination of the suit by the State of Dakota in the State Court, but the same was denied, and thereafter the petition for mandamus in the Circuit Court of Appeals was filed and the writ denied whereupon the U. S. Supreme Court granted the writ of certiorari to review the action of the Court of Appeals.

The Court in its opinion on page 280 recognized that there were different views as to the right to issue such writs (mandamus) before the appellate court has actually obtained jurisdiction of the case, and on that same page says:

> "There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction *actually acquired*."

and then the opinion goes on to say:

> "But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the Court below."

And the Court on page 281 (bottom of page), and 282 says:

> "It cannot be denied that a Circuit Court of the United States like other Courts had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the state court by its action in a case involving all the parties might render a judgment which would be *res judicata* and thus prevent further proceedings in the Federal Court."

And at the bottom of page 280 the Court in that case says:

> "Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the State Court, might prevent the adjudication of the questions involved and thereby prevent a review thereof in the Circuit Court of Appeals which had jurisdiction for that purpose we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it."

The purpose then in granting the writ of mandamus in that case was to compel the Federal Court below to proceed with the action so that the Circuit Court could exercise its right of review on appeal. Thus it was in direct line with all the cases; it was a mandamus in aid of the appellate jurisdiction of the Circuit Court of Appeals. That case therefore instead of supporting petitioner's view is in direct opposition to it.

Petitioner's brief contains extracts from numerous citations to justify the allowance of the writ of mandamus.

These numerous citations utterly fail to justify the allowance of the writ of mandamus as in none of them was a writ of mandamus allowed. *Bronson* v. *Schulten*, 104 U. S. Supreme Court 410, cited on page 8 of petitioner's brief, and *Wetmore* v. *Karrick*, 205 U. S. Supreme Court 141, on page 11 of petitioner's brief, went to the U. S. Supreme Court by writ of error, not by mandamus.

Nelson v. *Meehan*, 155 Federal Rep., page 1, cited on page 13 of petitioner's brief, went to the United States Circuit Court of Appeals, on appeal, not mandamus. The same jurisdictional question was involved.

In all of petitioner's brief he has not cited one authority to justify the allowance of a writ of mandamus; the cases which he cites support the opposite view, viz; that the jurisdictional question involved in this case can only be reviewed on appeal or writ of error.

See also *Hammond Lumber Co. v. U. S. District Court for District of Oregon, et al.*, 240 Federal Rep., page 924, on page 926; *Muir* v. *Chatfield*, 255 Federal Rep., page 204.

In re Pollitz, 206 U. S. 323, was an application for mandamus to compel the Circuit Court of U. S. for the Southern District of New York to remand to the Supreme Court of New York a cause which the Circuit Court has refused to remand because of the opinion that a separable controversy was presented within its jurisdiction. The application was denied, the Court saying:

> "If the ruling of the Circuit Court was erroneous as is contended but which we do not intimate, it may be reviewed after final decree on appeal or error."

Ex Parte Nebraska, 209 U. S. 436-442, was also an application for mandamus and was denied, the Court saying that the writ could not be used to perform the office of an appeal or writ of error.

The only case cited by petitioner, that touches upon the jurisdiction of the Circuit Court of Appeals to issue the writ of mandamus is *McClellan* v. *Carland (supra)*. All the other cases cited by him had to do with the jurisdiction and power of THIS (U. S. Supreme) Court only.

Whatever may be the power of THIS Court, it is certain that the Circuit Court of Appeals is a statutory court and its authority to grant writs must be found in the statute if it exists. Section 12 of the act creating the Circuit Court of Appeals (26 Stat. 826, 828) provides that it shall have the powers specified in paragraph 716 of the Revised Statutes of the United States; and as was said in *McClellan* v. *Carland (supra)*,

> "that section when read in connection with paragraph 12 of the Court of Appeals act it gives the Circuit Court of Appeals the authority as this Court has to issue writs not specially provided for by statute and *necessary for the exercise of the Court's jurisdiction* and agreeable to the usages and principles of law."

The issuance of a writ of mandamus by the Circuit Court of Appeals in this case was not necessary for the exercise of that court's jurisdiction, which is only appellate. As was pointed out by Davis, Circuit Judge, in disallowing the writ of mandamus.

> "If we dismiss the rule the case may possibly reach this Court again, but if the judgment is reinstated the case will remain final in that court and will never come into this Court. The reinstatement of the judgment therefore cannot be in aid of the jurisdiction of this Court." (see p. 48 of transcript.)

Petitioner in his brief misconstrues entirely the opinion of the Circuit Court of Appeals in this case. He says on p. 21 of his brief:

> "In the case at bar the Circuit Court of Appeals held in effect that it had no jurisdiction because the action was pending in the District Court and had not been brought into its jurisdiction by a writ of

error and therefore the writ could not be issued as in aid of its jurisdiction."

He then quotes from the case of *Barber Asphalt Paving Company* v. *Morris*, the following:

"The moment such a suit is commenced the appellate jurisdiction over it exists, the power and the right to *ultimately* review the proceedings in it are vested in one of the Appellate Courts."

We have no complaint with that rule and we maintain that the Circuit Court of Appeals in the case at bar had it in mind when it rendered the decision disallowing the writ of mandamus; for the opinion reads,

"If we dismiss the rule the case *may possibly reach this Court again*, but if the judgment is reinstated the case will remain final in that Court and and will never come into this Court" (page 48, Case).

So that the Circuit Court of Appeals recognized the possibility of the case reaching the Circuit Court of Appeals again even though it was not in that court then, and thus the decision was in conformity with the rule.

The Circuit Court of Appeals can only review final decisions.

We further urge that the order made by the U. S. Dist. Court allowing a new trial was not a *final* decision, and therefore, the Circuit Court of Appeals had no jurisdiction to review it. In the United States Compiled Statutes (1925) is the following provision concerning appeals to the Circuit Court of Appeals 1120 (Judicial Code p. 128 amended) Appellate Jurisdiction (a) Review of final decisions—The Circuit Court of Appeals shall have Appellate jurisdiction to, review by appeal or writ of error final decisions—

First. In the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 238.

We have nothing to do with Section 238 which, however, I may state does not provide for a direct review in the U. S. Supreme Court of an order of the U. S. District Court such as was made in this case. We are only here concerned with the general provision; and that speaks of *final decisions* that may be reviewed by the Circuit Court of Appeals. The order of the U. S. District Court in this case allowing a new trial was not a final decision.

The case of *Ft. Dodge Portland Cement Corporation* v. *Monk*, 276 Federal Reporter, p. 113, presented the following facts. Action was to recover in the District Court of United States for District of South Dakota, the amount of a promissory note. Plaintiff in error recovered judgment for the amount of the note and interest. Defendant in error moved for a new trial. The trial court granted the motion for a new trial. The order granting a new trial did not in terms vacate the judgment for plaintiff in error, but that was its legal effect. Plaintiff in error sued out a writ of error from the order granting a new trial. Circuit Judge Carland in deciding the matter said:

> "Counsel for defendants in error insist that we have no authority to review the order granting a new trial for the reason that whether it should be granted or not rested in the sound discretion of the trial court and such discretion is not reviewable. It appears from the record, however, that we have no jurisdiction over the case and can do nothing but dismiss the writ of error. *Our jurisdiction to review the decisions of the District Court is limited by law to final decisions.* Judicial Code par. 128; section 6, Act of March 3, 1891, C. 517, 26 Stat. 828 (Comp. St. para. 1120)."

(See present law in U. S. Compiled Statutes (1925) 1120 (Judicial Code p. 128 amended); the statute is substantially the same insofar as it applies to the question here discussed.)

The opnion then continues:

> "So far as the finality of the order granting a new trial is concerned it left the case as if it had never been tried. It would, therefore, seem that no argument is necessary to show that an order which had the effect stated is not a final decision of the District Court. If, however, authority is required for the position here taken it may be found in Hume *v.* Bowie, 148 U. S. 245; Baker, *et al.* Assignees *v.* White, 92 U. S. 176; Parcels *v.* Johnson, 87 U. S. (20 Wall.) 653; McComb Ex. *v.* Com'rs Knox Co., 91 U. S. 1; Moore *v.* Robbins, 85 U. S. 588; St. Clair Co. *v.* Lovingston, 87 U. S. 628; Tracy *v.* Holcombe, 65 U. S. 426 (and other cases cited in the opinion. All the above are not cases where new trials have been granted but they are cases which clearly decide that the judgment appealed from must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance by the appellate court the court below would have nothing to do but to execute the judgment or decree which it had already rendered. Writ of error dismissed."

See also 11 Cyc. p. 941; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. p. 675; *Bostwick* v. *Brinkerhoff*, 106 U. S. p. 73; *Gibbons* v. *Ogden*, 6 Wheaton, p. 448. See foot notes. *Mayberry* v. *Thompson*, 5 Howard 121.

It is therefore submitted that:

First. The application for the writ of mandamus in the Circuit Court of Appeals was an attempt to use that writ as and for a writ of error or an appeal.

Second. The order of the U. S. District Court allowing a new trial was not a final decision and could not be reviewed by the Circuit Court of Appeals.

POINT II.

Mandamus should not issue unless there has been a definite unqualified refusal to act by the Inferior Court after previous request made to it.

In the case *sub jud.* the order of the United States District Court setting aside the verdict and granting a new trial was entered May 11, 1925 (see p. 12 transcript). That was the last act of the United States District Court in the cause. No further step was taken by the railroad company (the petitioner herein), before the United States District Court to vacate the order granting a new trial; hence there was no refusal by that court.

Mesler v. *Jackson*, Circuit Judge, 154 Northwestern Reporter, p. 63, recognizes the general rule that 'A writ of mandamus to compel the judge of a lower court to vacate his order may be denied where there has been no application to him to set aside the order." See also *Hitchcock* v. *Wayne*, Circuit Judge, 97 Mich. 614, 56 N. W. Rep. 189. *Freud* v. *Wayne*, Circuit Judge, 131 Mich.; N. W. Rep. 109; *Bennett* v. *Kalamazoo*, Circuit Judge, 181 Mich. 709; 148 N. W. Rep. 162.

Edinburg Coal Co. v. *Humphreys*, Judge, 134 Federal Reporter, p. 839, also recognizes and applies this rule, the Court saying: "Were the proceedings in the District Court *coram non judice* the relator's petition would fail because of want of application to the District Court before the presentation of the petition here."

The prayer of petitioner's petition in the Circuit Court of Appeals in the case *sub jud.* (see page 6 transcript of record) asks that "A writ of mandamus may issue out of this Honorable Court (Circuit Court of Appeals) directing and commanding the said Honorable John Rellstab, Judge of the said District Court, and said District Court to reinstate the judgment entered in said District Court in favor of your petitioner (railroad company) etc."

Short on Mandamus (text book series) on page 267 states the rule as follows:

> "The Court, before it will grant a mandamus, must be convinced that there has been a demand made by a party having a right to make it for the performance of the duty sought to be enforced and a refusal to perform it by the party against whom the application is made."

No application to the United States District Court to reinstate the judgment was made by the railroad company in this case.

The writ of mandamus could only be used to compel the United States District Court to perform the duty (if the duty existed) of reinstating the judgment after it had refused to perform that duty, but it could not be used by the Circuit Court of Appeals to undo the order of the United States District Court allowing a new trial to the plaintiff.

Short on Mandamus (supra), p. 247, states the rules as follows:

> "The application must be to compel the performance of some duty which has not been done *it must not be to order the undoing of an act which has been done.*"

See also *Corpus Juris*, Vol. 38, p. 592.

It cannot be said that it would have been unavailing for petitioner to have made the application to the United States District Court for an order to vacate the order allowing a new trial; for District Court Judge Rellstab in allowing the new trial said:

> "However if you think the Court has lost jurisdiction over the verdict rendered, you may brief that matter if you so desire."

Counsel however did not choose to brief the matter and did not apply to the U. S. District Court to set aside the order allowing a new trial.

POINT III.

The granting or refusing of a writ of mandamus is discretionary.

There may be circumstances in which the writ will not operate fairly *or will not permit substantial justice*, and in which the Court may deny the writ though the petitioner may have a clear legal right.

In the case at bar a grave injustice would be perpetrated should this Court reinstate the judgment set aside by Judge Rellstab. It was a judgment tainted with fraud and perjury and Judge Rellstab after hearing the evidence so found, and it must shock the conscience of this Court to be obliged to listen to an application asking its aid in the perpetuation of a fraud and the promotion of manifest injustice; since the granting or refusing of the writ is discretionary this court ought not to hesitate a moment to announce that it will not compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a fraud.

The principle contended for finds support in the cases and has been frequently applied by this Court.

Duncan Townsite Co. v. *Lane, Secretary of Interior*, 245 U. S. 308, 38 Sup. Ct. 99, was an application by petition, for a writ of mandamus brought in the Supreme Court of the District of Columbia, to compel the Secretary of the Interior to restore the name of Nicholas Albertson, deceased, to the rolls under the Choctow-Chickasaw agreement of July 1, 1902, and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission. Under that act only the names of persons alive September 25, 1902, were entitled to entry on the rolls; Albertson had died before that date. The entry of his name and the issuance of the certificate were procured by fraud and perjury and the Sec. of the Interior upon recommendation of the commission removed

Albertson's name from the rolls, held the certificates for cancellation and allotted the land to others. Notice of the hearing before the Commission was given to Albertson's Administrator and attorney of record, but not to the relator who had under the Oklahoma law recorded the deed assigning the certificate and was in actual possession of the premises. The relator purchased the certificates before July 11, 1908, for value in good faith without knowledge of the fraud or notice of the proceedings for cancellation hereinbefore referred to. The Supeme Court entered judgment for the relator commanding issue and record of the patent but making no order in respect to restoring Albertson's name to the rolls. The relator acquiesced in the judgment but on a writ of error sued out by respondent the judgment was reversed by the Court of Appeals and the relator brings the case here on writ of error.

Mr. Justice Brandies in disposing of the application for a mandamus said:

> "*Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion.* It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles. The relator having itself only an equity seeks the aid of the Court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose.
>
> See Turner v. Fisher, 222 U. S. 204, 32 Sup. Ct. 37, 56 L. Ed. 165. Judgment of the Court of Appeals is affirmed."

And in the case of *U. S.* v. *Cargill*, 258 Fed. Rep., which cites with approval *Duncan Townsite Co.* v. *Lane, supra,* the Court says on page 467:

> "Mandamus is a writ of discretion."

And in the case of *U. S.* v. *Burleson*, 258 Fed. Rep. p. 282, the Court says:

> "Mandamus a remedial process is awarded not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles."

That case cites with approval *Duncan Townsite Co.* v. *Lane, supra; Arant* v. *Lane*, 249 U. S. p. 367; In *U. S. ex rel. Arant* v. *Lane, Secretary of Interior, supra,* the relator on April 30, 1915, filed his petition in the Supreme Court of the District of Columbia, for a writ of mandamus against Franklin K. Lane, as secretary. He alleged that when serving as a duly apointed Superintendent of Crater Lake National Park, June 7, 1913, defendant requested him to resign; that protesting against such removal from office he demanded that he be furnished with a statement in writing of the reasons for his removal and that he be given a reasonable time in which to answer and upon July 20, 1913, he was forcibly ejected from the Government office building and the records and papers of his office were seized by Government officials. He further averred: that as such superintendent he was in the classified civil service of the Government and that he could not lawfully be removed therefrom except for such cause as would promote the efficiency of the service and for reasons stated in writing which he must be given a reasonable opportunity to answer. His prayer was that the defendant be required to answer his petition and that upon hearing, a writ of mandamus should issue requiring the defendant to vacate the order for his dismissal and to restore him to his former office.

In response to a rule to show cause the defendant filed an answer to which a demurrer was interposed; the de-

murrer was overruled and the relator electing to stand on his demurrer his petition was dismissed.

It will be seen that although the relator was definitely removed from office as of June 30, 1913, and was forcibly ejected from the Government office building on July 20, 1913, he did not file his petition until more than twenty months later, April 30, 1915.

Without discussion of the authority of the Secretary of the Interior to remove the relator without filing charges against him and giving him an opportunity to answer, the Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia, on the ground of laches and the case is here on a writ of error.

The Court in an opinion by Mr. Justice Clark, said:

> "In this conclusion we fully concur.
>
> This Court has lately said that while mandamus is classed as a legal remedy it is a remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles.
>
> Duncan Townsite Co. v. Lane, *supra.*
>
> It is an extraordinary remedy and it is generally recorded as not embraced within statutes of limitation applicable to ordinary actions, but is subject to the equitable doctrine of laches."

Another case in point is *People, ex rel. Wood* v. *Board of Assessors and Collector of Taxes of Brooklyn*, 137 N. Y., page 203, in which the Court said as follows:

> "But there is still a further ground upon which the decision below can be upheld even if we assume there was a technical want of adequate authority to make the alteration and correction complained of. The writ of mandamus is not always demandable as an absolute right, and whether it shall be granted or not frequently rests in the discretion of the Court. The State *ex rel.* v. Commissioners of Phillips Co., 26 Kan. 419; People v. Hatch, 33 Ill. 9,

134; People, *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y. 360.

The writ will be granted to prevent a failure of justice, but never to promote manifest injustice. It is a remedial process and may be used to remedy a wrong not to promote one; to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief *or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud.*

The relator must come into court with clean hands and he cannot invoke this extraordinary remedy as in this case to evade the payment of a just portion of a tax by taking and claiming the advantage of a confessed mistake. Even if he had no other remedy he should be left to his own devices to escape the burden honestly resting upon him, and the Court may properly refuse to aid him by compulsory process."

In 26 *Cyc.*, p. 155, appears the following:

"The writ is employed to promote principles of justice." Hence the writ will not issue in support of unjust claims although they may be technically regular."

And on pp. 150-151 same volume of *Cyc.* the following appears:

"The relator's hands must be clean; he must not have contributed to the condition complained of." "It will never issue to accomplish a wrong."

In the case at bar the right sought to be enforced is the re-possession of a judgment which is admittedly tainted with fraud and perjury. Petitioner does not deny the fraud or perjury, it is a conceded fact in the case, and since the writ of mandamus is not demandable as an absolute right but calls for the exercise of discretion it should not be allowed to promote a manifest injustice, and the application was properly denied by the Circuit Court of Appeals.

Under the present heading it may be proper to notice another point which petitioner offers for the consideration of this Court.

Beginning on p. 25 of petitioner's brief it is contended by petitioner that the Circuit Court of Appeals had jurisdiction to issue the writ in vindication of its own mandate affirming the judgment in question, on a previous appeal.

It may be that the Circuit Court of Appeals had jurisdiction to issue the writ, if it saw fit; but it was not bound to do so. It was discretionary with the Circuit Court of Appeals to require the petitioner to have the order of the U. S. District Court reviewed by a writ of error or an appeal rather than a writ of mandamus; and this view has found support in a very recent decision of the Circuit Court of Appeals.

I refer to the case of *Brictson Mfg. Co.* v. *Munger, District Judge, et al.*, decided by the Circuit Court of Appeals, 8th Circuit, on June 13th last, in which that Court held likewise that the allowance of the writ of mandamus a matter of discretion. That was a case similar to the case at bar. It was a motion for leave to file a petition for a writ of mandamus and for an order to show cause against Hon. T. C. Munger, District Judge for the District of Nebraska.

The matters involved occurred in the receivership proceedings of the *Brictson Mfg. Co.* v. *Close*, other phases of the litigation appear in this Court in *Brictson Mfg. Co.* v. *Close* and in other suits. The Close opinion determined that a receiver for the Brictson Mfg. Co. had been wrongfully appointed and that the receiver should be required to return all property in his hands to those from whom he had received it, that he be thereupon discharged and that the bill be dismissed at complainant's costs. Had such directions of this Court (Circuit Court of Appeals) been carried out, much, if not all of the subsequent com-

plications and harassments might have been avoided, but they were not.

In 1921, 1924, lands of the Company (then in possession of the receiver) were sold for State taxes and a tax deed issued in May, 1926. The holder of the tax deed executed a quit-claim deed to Mary J. Rosso, who made repairs and improvements on the property. The Company filed a petition to have these deeds declared void, etc. This petition is based on the theory that the above decrees are in violation of the mandates of this Court sent down on prior proceedings in this Court. The basis of jurisdiction in this Court to maintain the mandamus is stated to be to protect the orders and mandates of this Court.

In an opinion by Circuit Judge Stone, the Court says:

> "We have no doubt of the jurisdiction of this Court (Circuit Court of Appeals) to compel the enforcement of its decrees and mandates by mandamus." Citing Louisville, 23 U. S. 639, 34 Sup. Ct. 255, 58 L. Ed. 413; *In re* Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 Sup. Ct. 291, 40 L. Ed. 414.
>
> We do not question our power to issue the writ in the present proceedings. However, mandamus is not a writ of right, but it is issued as a matter of sound judicial discretion. Citing Duncan Townsite *v.* Lane, *supra;* Turner *v.* Fisher, 222 U. S. 204. • • • Nor is the right remedy to be employed as a substitute for the ordinary modes of review (appeal and writ of error)."
>
> "Where a trial court has filed a mandate may be examined on appeal.
>
> Citing Steinfeld *v.* Zeckendorf, 239 U. S. 26, and in denying the writ the court says:
>
> 'We think a sound judicial discretion required a denial of the application to file the petition and for that reason it is denied.'"

In the above case it thus appears that the Court exercised its discretion in denying the application for a mandamus where it had the power and jurisdiction to allow the writ, and required the petitioner to resort to an appeal or writ of error to have reviewed an order said to be in conflict with the mandate of that Court.

We respectfully urge that in the case at bar the Circuit Court of Appeals was not bound to allow a writ of mandamus to review an order of the lower court said to be in conflict with its mandate. It was discretionary with the Circuit Court of Appeals to allow or withhold the writ, and we submit that this Court ought not to substitute its discretion for that of the Circuit Court of Appeals.

And, lastly, we urge that the basis of petitioner's application in the Circuit Court of Appeals was not the protection of the mandate of that Court, but the granting of a new trial after the term at which it was rendered had expired.

We beg leave to refer to the petition filed by petitioner in the Circuit Court of Appeals, on page 5 of the transcript. Par. XIV reads as follows:

> "XIV. Your petitioner further shows that it is advised that the said Honorable John Rellstab, Judge of the said District Court, and said District Court had no right or authority to disturb or set aside the verdict and judgment entered thereon in favor of the defendant on June 21, 1923, *because the said District Court had lost jurisdiction of said cause, the term of said District Court in which said judgment final was rendered in favor of your petitioner having long since expired and having not been extended either by stipulation between the parties thereto or any order of the Court in the premises.*"

The word "mandate" appeared twice in the petition, once in Par. VI and once in Par. VII, but only by way of recital. Nowhere in the petition did the petitioner urge

the violation of the Court's mandate as a ground for allowing the writ of mandamus; and while petitioner's brief in the Circuit Court of Appeals is no part of the record in this Court, yet it may be interesting to know that that brief made no mention of the mandate of the Circuit Court of Appeals, but rested the case upon the one ground set forth in Par. XIV of the petition above set forth.

We fail to understand, therefore, how petitioner can complain in this Court of the alleged failure of the Circuit Court of Appeals to protect its own mandate in favor of the petitioner, and ask this Court to reverse the ruling of the Circuit Court of Appeals when that Court was never asked to pass upon that question.

For the foregoing reasons we respectfully submit that the application of petitioner be denied.

Respectfully submitted,

HARRY KALISCH,
Counsel for Respondents.